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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WELLS FARGO BANK, NATIONAL
ASSOCIATION,

Plaintiff and Respondent,

v.

WAJIH AJIB,

Defendant and Appellant.

F075083

(Super. Ct. No. 10CECG03997)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Donald S. Black,
Judge.

Law Offices of Armand Tinkerian and Armand Tinkerian for Defendant and
Appellant.

Anne M. Schauerman for Plaintiff and Respondent.

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In 2010, Financial Assistance, Inc. (FAI) sued Wajih Ajib (Ajib) to collect a debt
Ajib incurred on a line of credit issued by Wells Fargo Bank, National Association
(Wells Fargo). FAI alleged Wells Fargo assigned its claim on the debt to it for collection
before the complaint was filed. In October 2013, following a court trial, a judgment of

nearly \$50,000 was entered in FAI's favor against Ajib. Three years later, after the trial court granted Wells Fargo's application to be substituted as the plaintiff in FAI's place, Ajib moved to set aside the judgment as void on the ground FAI did not have standing to bring the action because the claim was not assigned to FAI until 2013. The trial court denied the motion.

On appeal, Ajib contends the trial court erred in denying the motion. We conclude Ajib did not meet his burden of establishing that the claim was assigned to FAI in 2013, and thus did not meet his burden of establishing the judgment is void. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2007, a "Business Direct Application" was prepared online in the name of Nshan Enterprise and Ajib and delivered to a Wells Fargo representative. A \$50,000 line of credit was authorized. By July 2007, the line of credit had been drawn down to zero. The last payment on the account was in December 2007, and it was charged off as delinquent in April 2008.

In June 2010, Ajib filed a small claims action against Financial Assistance, Inc., alleging FAI violated the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 et seq.) in trying to collect on the line of credit debt. FAI filed its complaint against Nshan Enterprise and Ajib in November 2010, and a first amended complaint, which contained the same or similar allegations, in March 2011.¹ FAI alleged causes of action for breach of a written agreement, breach of guaranty, and account stated. As pertinent here, FAI alleged that in February 2010, Wells Fargo assigned its claim against Nshan Enterprise and Ajib to FAI to collect the past due balance. Ajib filed an answer to the

¹ The first amended complaint was verified by FAI's vice president, Gus Carlson, who alleged the matters stated in the first amended complaint were true based on information and belief.

first amended complaint in March 2011 and FAI dismissed Nshan Enterprise as a defendant in May 2011.

In September 2013, Ajib dismissed his small claims action without prejudice and a court trial commenced on FAI's complaint. Following the receipt of testimony and documentary evidence, the trial court issued a written decision in which it found in favor of FAI on all of its claims. The trial court determined it was Ajib who solicited, obtained and guaranteed the line of credit through Wells Fargo. On this basis, the trial court found Ajib was responsible to FAI for the principal amount of \$49,482.40 and awarded prejudgment and postjudgment interest. Judgment was entered in FAI's favor and against Ajib in October 2013.

Ajib appealed the judgment to this court. In March 2015, we affirmed the judgment in an unpublished opinion, *Financial Assistance, Inc. v. Ajib* (Mar. 30, 2015, F068715). The California Supreme Court denied Ajib's petition for review in June 2015.

In October 2015, the "Office of the General Counsel" was substituted as counsel for "Wells Fargo Bank, National Association, Assignee of Financial Assistance, Inc., a Washington corporation." In January 2016, Wells Fargo filed an application to substitute itself as the plaintiff in place of FAI. Wells Fargo asserted that before the complaint was filed, Wells Fargo assigned its rights as to Nshan Enterprise and Ajib to FAI for servicing, and those rights were sold back to Wells Fargo on October 31, 2013.

In support of the application, Wells Fargo submitted the declaration of Rion Z. Caine, a Wells Fargo assistant vice-president and loan adjustment manager. Caine was one of Wells Fargo's collection managers who worked on Ajib's file, and he was familiar with debt sales and the repurchase of sold debt. Caine declared that Wells Fargo was the original creditor of Nshan Enterprise and Ajib, and, as alleged in the underlying complaint, Wells Fargo sold and assigned its rights as to Nshan Enterprise and Ajib to FAI for servicing before the complaint was filed. Caine further declared that on or about

October 31, 2013, FAI sold back to Wells Fargo its rights as to Nshan Enterprise and Ajib, as evidenced by “Exhibit 1” (Exhibit 1) attached to his declaration. Exhibit 1 is a one-page document entitled “Statement of Work No.3.” The document states in the recitals that Wells Fargo sold 200 accounts to FAI “from January 2013 through July 2013” and now Wells Fargo desired to purchase 79 “of such Accounts back from FAI.” In a paragraph with the heading “Purchase of Accounts,” the document provides that “Wells Fargo hereby purchases from FAI the Accounts listed in Attachment 1” (Attachment 1) for \$625,000, effective October 31, 2013. In another paragraph with the heading “Purchase Closing,” FAI agreed to assign to Wells Fargo all of FAI’s rights to each of the purchased accounts. Attachment 1, however, was not included with the exhibit.

Ajib opposed the application. In his declaration, he asserted in part that because Exhibit 1 stated Wells Fargo sold 200 accounts to FAI from January 2013 through July 2013, and the complaint was filed in 2010, it appeared that Wells Fargo and FAI did not “have an agreement nor sold the account to another and both worked together to defraud the court and the Defendant at the time this complaint was filed.”

The trial court granted Wells Fargo’s application on February 18, 2016. Nine months later, on November 17, 2016, Ajib filed a motion to set aside the October 2013 judgment pursuant to Code of Civil Procedure section 473, subdivision (d),² and permit the filing of a responsive pleading and cross-complaint. Ajib argued the judgment should be set aside as void, and FAI’s action dismissed, because FAI did not have standing to sue Ajib in 2010, as Exhibit 1 to Caine’s declaration showed that Wells Fargo assigned the claim against him to FAI in 2013. Ajib further argued the trial court should exercise its inherent power to set aside the judgment because FAI committed fraud on the court by

² Undesignated statutory references are to the Code of Civil Procedure.

claiming it had standing to sue in 2010. Ajib asked the trial court to take judicial notice of the first amended complaint, Caine's declaration in support of the application for substitution, and the trial court's September 2013 decision. Ajib also submitted a proposed cross-complaint and answer.

Wells Fargo opposed the motion. Wells Fargo argued the judgment was not void on its face and there was no attempt to conceal that FAI was acting for Wells Fargo. Wells Fargo asserted it assigned the line of credit to FAI for collection in February 2010; FAI filed the complaint as Wells Fargo's assignee; a trial was held and judgment entered in October 2013; Wells Fargo took back the line of credit in October 2013, but waited for completion of the appeal to take further action; Wells Fargo substituted its own counsel in November 2015; and Wells Fargo filed the application to substitute itself as plaintiff in January 2016, which was granted the following month over Ajib's opposition. Wells Fargo asserted there was no extrinsic fraud and the rules Ajib relied upon existed to correct a fundamental wrong in a legal proceeding, not to reward persons such as Ajib who default on debts and then abuse the judicial process to avoid every court ruling.

Wells Fargo submitted the declaration of Kevin Griesman, a Wells Fargo loan adjustment manager who was one of the collections managers working on Ajib's file. Griesman declared the line of credit debt was assigned to FAI for third party collection in February 2010, and FAI informed Wells Fargo that Ajib filed a small claims action shortly after the assignment. Griesman explained that during 2013 and 2014, Wells Fargo was in the process of recalling all matters that had been assigned to third parties, such as FAI, for collection so they could be handled in house, but no immediate action was taken to resume the in-house collection of this matter because Ajib was appealing the judgment. Once the appeal was resolved in Wells Fargo's favor, Wells Fargo completed the recall of the file by substituting its in-house counsel as counsel of record and applying

to substitute itself as plaintiff. As of November 2016, Ajib had not made any arrangements to satisfy the judgment, which totaled \$52,058.38.

Wells Fargo's attorney, Anne Schauerman, declared that from 2013 through 2015, she worked with Wells Fargo to recall several matters that had been assigned to agencies such as FAI for collection. The Ajib judgment was intended to be recalled in late 2013, but no action was taken until Ajib's appeal concluded. Thereafter, her office substituted as counsel for Wells Fargo, and because it was necessary to reflect Wells Fargo as the judgment creditor, Wells Fargo applied for substitution as the plaintiff.

Wells Fargo asked the trial court to take judicial notice of various documents in the court's file, including the September 2013 trial court decision and resulting judgment, the appellate court opinion, the Supreme Court's denial of the petition for review, the court's docket, Ajib's declaration in opposition to Wells Fargo's application to substitute itself as plaintiff, and the February 2016 order granting the substitution.

After hearing oral argument on Ajib's motion on December 14, 2016, the trial court took the matter under submission. On January 12, 2017, the trial court issued a written order denying the motion, as Ajib failed to satisfy his burden of producing evidence in support of the motion. The trial court explained that while Ajib was correct that FAI's filing of its lawsuit was only proper if it was the assignee at the time, the exhibit he relied on did not actually prove the initial assignment of Ajib's debt did not happen until 2013.³ The exhibit stated Wells Fargo and FAI were agreeing on a sale of 79 accounts and referred to "the Accounts listed in Attachment 1," but Attachment 1 was not included in the exhibit and the exhibit did not identify Ajib's debt, i.e., the assigned

³ Once a claim has been assigned, the assignee is the owner and has the right to sue on the claim, while the assignor lacks standing to sue on it. (*Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402; *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co.* (1962) 205 Cal.App.2d 68, 76.)

claim in question, as being included in either the original 200 accounts sold to FAI or the 79 accounts Wells Fargo was repurchasing.

On January 18, 2017, Ajib filed a notice of appeal in which he stated he was appealing the “01/13/2017” “judgment after court trial.”

DISCUSSION

Ajib contends the trial court erred when it failed to set aside the October 2013 judgment. While Ajib concedes there is “some evidence” that shows Wells Fargo assigned the claim to FAI for collection in February 2010 and “[v]iewing the evidence in the light most favorable to [Wells Fargo] the judgment should stand,” he claims the “undisputed facts” show Wells Fargo’s evidence is “not credible, reasonable in nature or of solid value.” Ajib asserts that since Wells Fargo did not assign the claim to FAI until 2013, FAI did not have standing to sue him in 2010, and the judgment must be vacated.

Ajib sought to set aside the judgment based on section 473, subdivision (d), which provides that a trial court “may, ... on motion of either party ..., set aside any void judgment or order.” In considering such a motion, the trial court first determines whether the judgment or order is void and, if so, whether it will exercise its discretion to grant or deny the motion. (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1020.) We review the trial court’s determination whether a judgment or order is void de novo. (*Ibid.*) To the extent the ruling is based on the resolution of disputed facts, we defer to the trial court’s factual determinations “when the evidence is in conflict, whether the evidence consists of oral testimony or declarations.” (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1441 (*Ramos*).)⁴

⁴ While the parties both assert the standard of review is substantial evidence, neither party cites any authority to support application of that standard to motions to set aside a judgment as void. The weight of authority states that evaluating an order or judgment as void is a question of law, which we review de novo. (*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822; *Talley v. Valuation Counselors Group, Inc.*

Ajib's argument on appeal is essentially that Wells Fargo failed to establish that it assigned his account to FAI in February 2010. Ajib, however, misunderstands the burden of proof here. As the moving party, Ajib had the burden of proving that Wells Fargo had not assigned the account to FAI before the complaint was filed. (Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"].)

In support of his motion, Ajib presented Caine's declaration, which included Exhibit 1. Caine declared that Wells Fargo assigned its rights over Ajib's account to FAI for servicing before the complaint was filed, and, as evidenced in Exhibit 1, FAI sold those rights back to Wells Fargo on October 31, 2013. While Exhibit 1 states in the recitals that Wells Fargo sold 200 accounts to FAI from January 2013 through July 2013, and it wanted to repurchase 79 of those accounts from FAI and refers to "the Accounts listed in Attachment 1" as the purchased accounts, Attachment 1 was not included in the exhibit. We agree with the trial court that there is nothing in Exhibit 1 that identified Ajib's account as being included in either the original 200 accounts sold to FAI or the 79 accounts Wells Fargo was repurchasing. Thus, the exhibit does not prove that the initial assignment of Ajib's account from Wells Fargo to FAI did not happen until 2013.

Ajib apparently contends it does not matter whether Attachment 1 was included in the exhibit. He asserts "the only reasonable explanation" of Exhibit 1 is that his account was among the 200 accounts Wells Fargo sold to FAI in 2013, since Wells Fargo used the exhibit to explain in its application for substitution how it sold the account to FAI and later repurchased it. Caine, however, did not use the exhibit to explain how it sold the account to FAI, as he specifically declares that "Wells Fargo sold and assigned its rights"

(2010) 191 Cal.App.4th 132, 146; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495-496.) Issues raised by evidentiary matters, however, are reviewed under the abuse of discretion standard. (*Ramos, supra*, 223 Cal.App.4th at pp. 1440-1441.)

as to Nshan Enterprise and Ajib to FAI for servicing “[p]rior to the filing of the complaint herein, and as alleged in the underlying complaint,” i.e., in 2010. Caine only refers to Exhibit 1 as evidence that FAI sold Ajib’s account back to Wells Fargo on October 31, 2013. Caine never said, as Ajib asserts, that the claim against him was part of the 200 accounts sold to FAI in 2013. As we have stated, without the attachment, we cannot tell whether Ajib’s account actually was included as one of the accounts referenced in Exhibit 1.

Ajib simply failed to meet his burden of establishing that Wells Fargo did not assign his account to FAI until 2013. Accordingly, Ajib could not show the judgment was void and the trial court did not err in denying his motion to set aside the judgment.

DISPOSITION

The order denying Ajib’s motion to set aside the judgment is affirmed.
Respondent is awarded its costs on appeal.

DE SANTOS, J.

WE CONCUR:

FRANSON, Acting P.J.

PEÑA, J.